

STATE OF MICHIGAN
COURT OF APPEALS

CRAIG A. RUTKA and PHILLIS RUTKA,

Plaintiffs/Appellants/Cross-
Appellees,

v

JOSEPH M. COLLINS, GARY M. COLLINS, and
CARRIER COLLINS,

Defendants/Appellees/Cross-
Appellants.

UNPUBLISHED

October 30, 2007

No. 268648

Oakland Circuit Court

LC No. 2004-062377-NI

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action. For the reasons set forth in this opinion, we affirm.

This no-fault automobile insurance case arose when defendant Joseph Collins, while intoxicated, rear-ended a car driven by plaintiff Craig Rutka while it was stopped at a railway crossing. Plaintiff Craig Rutka claims the accident caused him lower back nerve damage that has significantly impacted his life. Plaintiffs' claims were rejected by the jury, which found that plaintiff Craig Rutka did not suffer a serious impairment of an important body function. Plaintiffs have appealed from this verdict and defendants' application for delayed cross-appeal was granted.¹

Plaintiffs' allege in their appeal that the trial court, in its decision rejecting defendants' motion for summary disposition, made findings that found as a matter of law that plaintiff suffered an objective manifestation of serious injury to an important body function. Plaintiffs' further contend that defendants stipulated that this was the case. Therefore, according to plaintiffs, the issue was already decided and should not have been presented to the jury. However, our review of the record reveals that the trial court never made a ruling which

¹ *Rutka v Collins*, unpublished order of the Court of Appeals, entered October 20, 2006 (Docket No. 272931).

established that as a matter of law, plaintiff had suffered a serious impairment of a major body function. Nor can we find any evidence that defendants ever stipulated that this was the case. The trial court's order denying summary disposition to defendants includes a paraphrase of defendants' argument, stating that "[d]efendant submits that pursuant to *Kreiner*,² although plaintiff can establish an objective manifestation of injury, his injuries have not affected his general ability to lead a normal life." This is a paraphrase of defendants' argument that emphasizes the third prong of the *Kreiner* analysis. And as a paraphrase of defendants' argument, used as a lead-in to the trial court's analysis, this clearly is not a finding by the trial court. Thus, plaintiffs are not entitled to relief based on this issue.

Plaintiffs next argue that defendants, in closing arguments, gave repeated improper definitions for the term "serious," contrary to the specific jury instruction that defines what the term "serious impairment" means. Plaintiffs contend that (1) defendants improperly defined it as dangerous, severe, and grave; (2) the trial court overruled plaintiffs' objections, denied plaintiffs the opportunity for rebuttal to correct defendants' improper definitions, and finally that (3) plaintiffs were denied a curative instruction. Because plaintiffs objected to defendants' use of the word "serious" outside of the instructions regarding serious impairment, and the trial court overruled the objection, stating that "serious is a word of ordinary meaning" this issue is preserved for appeal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

Alleged improper conduct of an attorney is reviewed first for error, then whether the error was harmless. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102, 103; 330 NW2d 638 (1982).

Defendants argue, and we concur, that "serious" is not a word defined in the statute, MCL 500.3135, and is therefore open to ordinary interpretation from a dictionary definition. See, *Churchman v Rickerson*, 240 Mich App 223, 230; 611 NW2d 333 (2000). Therefore, defense counsel's use of the word "serious" using its ordinary meaning was not improper. Moreover, the court provided a definition of "serious impairment of an important body function" that was in keeping with the relevant statutes. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, because defendants' use of the word "serious" was not legally improper and the trial court gave an instruction providing the jury with a definition of serious impairment of an important body function, reversal of the jury's verdict is not warranted.

Plaintiffs contend that the jury instructions regarding what constitutes a serious impairment of an important body function should include, as a non-exclusive list, the *Kreiner* factors to help the jury better understand the issue, and thus, reversal of the jury's verdict is warranted in this case, in part, because the trial court improperly ruled that the special instruction was cumulative in light of the other instructions on serious impairment.

² *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

Whether a requested jury instruction is accurate and applicable based on a legal issue is a question of law. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 694-695; 630 NW2d 356 (2001). Questions of law are reviewed de novo. *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004). However, reversal is not required unless the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A); *Ward v Consolidated Rail Corp*, 472 Mich 77, 84, 87; 693 NW2d 366 (2005).

MCL 500.3135(1) provides as follows:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

MCL 500.3135(7) defines “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”

The jury instruction used stated the following:

Serious impairment of body function means an objectively manifested impairment of an important body function that affects the plaintiff’s ability to lead his normal life.

* * *

An impairment does not have to be permanent in order to be a serious impairment of body function.

In order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis.

In this case, the trial court instructed the jury with the model civil jury instruction, M Civ JI 36.11. Michigan case law specifically provides that special or supplemental instructions should be given *only* if the standard jury instruction does not adequately cover an area, *Stoddard v Manufacturers Nat’l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). Furthermore, we are bound by our Supreme Court to uphold the verdict of the jury in such cases where “[T]here is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury.” *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

We disagree with plaintiff’s assertions that the standard jury instruction for serious impairment of a bodily function failed to adequately instruct the jury. Contrary to plaintiffs’ argument, the trial court’s reading of the standard jury instruction served to properly inform the jury of their role as fact finders as it relates to the developing body of law under *Kreiner*. Thus, a special instruction was not required. *Stoddard, supra*. Nor can we conclude that the reading of

the standard jury instruction constituted plain error or that by failing to list the *Kreiner* factors a manifest injustice would result by our not disturbing the jury's decision. *Ward, supra*.

Thus, while a listing of the five *Kreiner* factors may augment M Civ JI 36.11, review of the record leads us to conclude that the applicable law was adequately and fairly presented to the jury. *Murdock, supra*. Accordingly, we decline plaintiffs' invitation to hold that the failure of the trial court to incorporate the five *Kreiner* factors into M Civ JI 36.11 requires reversal.

Having determined plaintiffs' arguments on appeal do not require reversal of the jury's verdict, we need not address the issues raised by defendants in their cross-appeal.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray